84-266 (1)

NO. 84 - ______

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH VENNERI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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23 pp

QUESTIONS PRESENTED

1. Whether, under the Mail Fraud Act, 18 U.S.C. §1341, a private employee's undisclosed breach of his duty to his employer to provide honest, faithful and loyal services may constitute a "scheme to defraud" under the federal Mail Fraud Act where the employer has received no economic loss or business risk as a result of the employee's breach.

2. Whether a private sector contractor has a legally protected right to have his bids for private sector business contracts judged solely on the basis of merit, quality and costs and whether the violation of such a right can serve as a predicate for criminal prosecution under the Mail Fraud Act, 18 U.S.C. §1341, against a private sector competitor found to have engaged in a scheme to defraud the contractor, by securing the contract on a basis other than merit, quality and costs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes:

Miscellaneous:

No. 84 - ______

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Joseph Venneri, the petitioner herein, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on June 21, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, attached hereto as Appendix A, is as of yet unreported.

JURISDICTION

The judgement of the Circuit Court of Appeals was entered on June 21, 1984 and no petition for rehearing or rehearing *en banc* was filed. The Circuit Court of Appeals denied petitioner's motion to stay the issuance of the mandate on July 17, 1984 without opinion. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISION INVOLVED

18 U.S.C. §1341 (MAIL FRAUD ACT)

Frauds and Swindles

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be

delivered by the person to whom it is addressed any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner Joseph Venneri was a glass and glazing subcontractor who, along with his partner Denny Stam, ("Stam") had over a fifteen-year period performed a large number of glass installation and glazing construction subcontracts on Marriott Corporation ("Marriott") hotel projects.

In the Fall of 1979, Marriott decided to build a hotel in Tampa, Florida, on property owned by the Austin-Westshore Corporation. While Marriott orginially intended to act as its own general contractor, and received bids from subcontractors, including Venneri and his associates, on December 20, 1979, Marriott agreed to hire Austin-Westshore to build the hotel as the general contractor. Austin-Westshore, as Marriott, had separately put the project out for bids, utilizing subcontractors other than Marriott's, and was able to establish a lower cost than Marriott's. According to Philip Graham, then the president of Austin-Westshore, Marriott was to pay Austin-Westshore a fixed price for the construction of the hotel. At that time Austin-Westshore also agreed that if it used a subcontractor who originally submitted a bid through Marriott, it would reduce the fixed price of the general contract by the amount that such a bid was less than the comparable bid received from the comparable Austin-Westshore subcontractor. However, Graham testified that those savings would only be passed through to Marriott on bids submitted before January 10, 1980. With respect to bids received after that date, Austin-Westshore, and not Marriott, would get the benefit of a lesser price and a lower bid. Even if a lower bid was received from a Marriott subcontractor, it would have no effect on the hotel general contract price paid by Marriott. After the December

20, 1979 agreement, Austin-Westshore had sole authority to select subcontractors for the Tampa project.

Marriott's project manager on the Tampa project was Frederick Taylor. Taylor's duties as Marriott's project manager were to verify work performed and authorize progress payments to Austin-Westshore. As early as July 1979, Taylor had begun shopping for a baby grand piano. At that time, he telephoned the Gisrael Piano Company ("Gisrael") to obtain a price quote for such a piano, and, at that time, falsely stated that he was a Marriott procurement officer.

On December 13, 1979, Taylor telephoned Gisrael and ordered a $7,035 baby grand piano. At that time, he told Gisrael that Stam would pay for it. Gisrael delivered the piano to Taylor's home on December 19, 1979 and, on that same date, mailed an invoice to Stam in care of Taylor's address.[1]

On January 4, 1980, Taylor, Graham, Terry Down of Mid-South Glass (Austin-Westshore's original glass and glazing subcontractor), Venneri, Stam and their other partner Aaron Strauss, met in Tampa. Stam, Strauss and Venneri were introduced to Downs as Marriott consultants and together they all "scoped" the job, insuring that the scope of the job specifications was clear and uniform. Shortly after that meeting, both Mid-South and Venneri's group submitted new bids in accordance with the clarification established at the meeting. Mid-South bid $990,500 and Venneri's group, Strauss Glass, bid $950,000. Thus, Strauss Glass was $40,500 less than Mid-South. On January 24, 1980, Austin-Westshore awarded the contract to Strauss Glass and gained the benefit of the $40,500 price savings. Pursuant to Graham's understanding of the agreement, Austin-Westshore never refunded, credited nor remitted the $40,500 savings to Marriott.

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[1]Taylor subsequently informed Gisrael to send the invoices to Stam's business address. Gisrael sent Stam two more invoices to Stam's post office box. These three invoices serve as the basis for the three mail fraud counts on which Venneri was convicted.

Thus, there was no ability for Marriott to be economically deprived in any manner. Venneri's conviction was based solely on the breach of Taylor's fiduciary duty, without either loss to or risk of loss to Marriott.

On February 20, 1980, Strauss gave Venneri a check made out to Venneri for the the cost of Taylor's piano and, on that same day, Venneri wrote a check on his personal account to Gisrael for the price of the piano delivered to Taylor more than two months earlier. It was Taylor's undisclosed receipt of the piano which served as the breach of his fiduciary duty which in turn was the predicate for the mail fraud prosecution.

Venneri, Stam and Strauss were indicted as a result of this transaction. Strauss testified on behalf of the government under an immunity agreement and the case against him was dismissed. Stam pleaded guilty to one count of mail fraud midway through the trial and the remaining charges against him were dismissed. Venneri was conviced by a jury of three counts of mail fraud in violation of 18 U.S.C §1341, each count related to a mailing by Gisrael of an invoice for Taylor's piano.

REASONS FOR GRANING THE WRIT

I. THE CIRCUIT COURTS ARE DIVIDED AS TO THE REQUIREMENTS OF A SCHEME TO DEFRAUD UNDER THE MAIL FRAUD ACT IN CASES INVOLVING A PRIVATE EMPLOYEE'S BREACH OF HIS DUTY OF LOYALTY TO HIS EMPLOYER.

In recent years, the Department of Justice has relied with increasing frequency on the use of the mail fraud (18 U.S.C. §1341) statutes in white collar cases. *See* Hagan & Nagel, *White-Collar Crime*, AM. CRIM. L. REV. 259, 286 (Table 6) (1982); UNITED STATES ATTORNEY'S OFFICE, STATISTICAL REPORT, FISCAL YEAR 1981 (Table 3); UNITED STATES ATTORNEY'S OFFICE, STATISTICAL REPORT, FISCAL YEAR 1980 (Table 3); UNITED STATES ATTORNEY'S OFFICE,

STATISTICAL REPORT, FISCAL 1979 (Table 3). A great part of that increased use consists of cases involving private sector employees who failed to disclose to their employer a breach of their duty of loyalty. *See*, D. Hurson, *Limiting the Federal Mail Fraud Statute–A Legislative Approach*, 20 AM CRIM. L. REV. 426 428-29 (1983).

This Court has long recognized that the use of the term "scheme to defraud" in the mail fraud statute was deliberately intended to allow the statute to maintain its flexibility and to adjust to the infinite variations of fraud that men can devise *Badders v. United States*, 240 U.S. 391 (1916).

As a result of this deliberate use of the vague term "scheme to defraud" and the expansive language used by other courts in applying that term, the Circuit Courts of Appeals have split over the application of the mail fraud statute in situations where the private employee's undisclosed breach of his fiduciary duty has not resulted in *any* economic risk of loss or harm to his employer. This division presents both fundamental and disturbing issues concerning the scope of federal criminal law enforcement. Through use of the mail fraud statute, the federal criminal process has been interjected into what had previously been private employment situations, left to an employer's right to seek civil redress for its employees' breaches. *Compare*, *United States v.Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), *with United States v. Newman*, 664 F.2d 12 (2d Cir. 1981), *cert. denied*, ____ U.S. ____, 103 S.Ct. 2095 (1983).

The imprecise application and definition of the term "scheme to defraud" has led the lower courts to equate federal criminal laws to ethical aspirations of loyalty:

> The fraudulent aspect of the scheme to "defraud" is measured by a nontechnical standard. . . . Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the "reflection of moral uprightness, or fundamental honesty, fair play and right dealing in

> the general and business life of members of society." . . . This is indeed broad. For as Justice Holmes once observed, "[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity."

Blachly v. *United States*, 380 F.2d 665, 671 (5th Cir. 1967) (citations omitted).

In applying this view of the statute, a number of courts have found that the mere nondisclosure of an employee's violation of his duty of loyalty to his employer, in and of itself, can form the basis for a criminal mail fraud prosection. Those courts, including the Fourth Circuit in the opinion below, have found that this disclosed breach, even without actual or potential monetary risk or loss to the employer, constitutes a "material nondisclosure" sufficient to sustain a conviction under the mail fraud statute. *United States* v. *Von Barta*, 635 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981); *United States* v. *Bronston*, 658 F.2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *United States* v. *Newman supra; United States* v. *Shamy*, 656 F.2d 956 (4th Cir. 1981).

In conflict with these decisions are cases from the Fifth and District of Columbia Circuits which hold that the mere failure of a private employee to disclose a conflict of interest or breach of his duty of loyalty is not sufficiently material to constitute a federal offense unless the conflict or the breach results in an economic risk or loss to the employer. *United States* v. *Ballard*, 663 F.2d 534 (5th Cir. Unit B 1981) *aff'd as modified*, 680 F.2d 352 (5th Cir. Unit B 1982); *United States* v. *Bethea*, 672 F.2d 407 (5th Cir. Unit B 1982); *United States* v. *Lemire*, 720 F.2d 1327 (D.C. Cir. 1983). See, *also*, *United States* v. *Feldman*, 711 F.2d 758, 763 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 352 (1983).

In analyzing the comparable language in the wire fraud statute, 18 U.S.C. §1343, the *Lemire* court analyzed materiality as follows:

> Employee loyalty is not an end in itself, it is a means

> to obtain and preserve pecuniary benefits for the employer. An employee's undisclosed conflict of interest does not by itself necessarily pose a threat of economic harm to the employer. Therefore, it does not alone constitute a sufficient indicium that the employee intended any criminally cognizable harm to the employer. (footnote omitted) Other surrounding circumstances may, of course, provide the necessary proof that an employee intended such harm. (footnote omitted) We hold today, however, that an intentional failure to disclose a conflict of interest, without more, it is not sufficient evidence of the intent to defraud an employer necessary under the wire fraud statute. (citation and footnote omitted) There must be a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer.

United States v. *Lemire, supra* at 1336-1337.

The question of what constitutes a material nondisclosure has been the subject of extensive comment in the legal community. *See*, Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" on a White Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983); Coffee, *From Tort to Crime: Some Reflections on the Criminalization of fiduciary Breaches and The Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1983); D. Hurson *Limiting the Federal Mail Fraud Statute – A Legislative Approach*, 20 AM. CRIM. L. REV. 423 (1983).

Petitioner respectfully submits that the application of the mail fraud statute into private employment relationships is a significant expansion of the statute. The split among the lower courts on the scope of the statute and the concept of materiality in private sector employment requires the Court's consideration and resolution of this division.

II. THE DUTY A PRIVATE SECTOR BUSINESSMAN OWED TO HIS COMPETITOR IS AN ISSUE OF FIRST IMPRESSION WHICH WARRANTS THIS COURT'S CONSIDERATION

The court below found that a contractor had a right to have private sector construction bids judged solely on the basis of merit, quality and costs of service and that a competitor's interference with that right constituted a scheme to defraud his competitor, punishable under the mail fraud act. This interpretation of 18 U.S.C. §1341 constitutes an unprecedented expansion of the mail fraud statute into private sector construction contracts.

It is important to note that in this instance, there is no allegation that the petitioner in any way interfered with his competitor's employees or in any way defeated or interfered with the opportunity of the competitor to submit a competitive bid on the basis of the same information and specifications upon which Venneri based his bid.

Rather, in this case, the allegation was merely that Venneri did not disclose himself as being a potential bidder to Downs of Mid-South Glass at the time that they met to go over the specifications. After that meeting, and after the specifications were established and the job scope was clarified, both Downs and Strauss Glass had the opportunity to submit independent bids through Austin-Westshore for the project. Venneri's bid was $40,500 lower than Mid-South's bid.

On the basis of the nondisclosure to Mid-South that he was a competitor, the court found that petitioner had defrauded Mid-South of the opportunity to have its bid judged solely on the basis of merit, quality and the costs of services.

No other court has held that a private sector general contractor owes its prospective subcontractors a right to have their bids judged solely on the competitive merits of the competing bids, let alone find that a competing subcontractor has violated federal criminal law by interfering with that right.

The only cases relied upon by the court below with respect to recognizing an obligation among competitors are *United States* v. *Castor*, 558 F.2d 379 (5th Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978) and *Gregory* v. *United States*, 253 F.2d 104 (5th Cir. 1958). In each of those cases the defendant's

fraudulent actions impacted on a significant public interest. In *Castor*, the defendant not only defrauded competing bidders for a limited number of government issued liquor licenses but did so in a manner which defrauded the licensing authority. By the use of false fronts and sham identities, the defendant was able to secure a disproportionate number of liquor licenses in violation of the authority's rules. Thus, not only were the competing bidders defrauded but so was the city and the public's interests in diversity of the holders of liquor licenses. In *Gregory*, the defendant was able to accomplish his fraudulent scheme by subverting the postage system itself. By using his position as a railroad postage clerk, defendant was able to fraudulently back date postmark submissions for a privately published newspaper which sponsored a college football score prediction contest. In *Gregory*, the court recognized that not only were the competing bidders defrauded by this manipulative scheme, but so was the contest sponsor who had a right to determine how it was he wished to award the prizes. Furthermore, the manipulation of the postage system directly impacts on the right of the public to have a fair, reliable and efficient postal service.

Neither of those cases goes so far as to create a duty among private sector contractors to insure that their competitor bids are based upon the nebulous standards of merit, quality and costs.

In this case, with access to the same information and equivalent specifications, petitioner's bid was significantly less than the supposedly defrauded competitor's bid. By artificially creating a duty among competitors out of whole cloth, the court below would have required that Austin-Westshore incur an additional $40,500 to complete the job.

Petitioner respectfully suggests that this Court should examine the issue of whether a competitor should be criminally punished under the mail fraud statute for violating a competitor's right to bid on mere quality cost of services when such a violation did not interfere with the ability of the competitor to prepare and submit a competitive bid on the basis of equal information.

CONCLUSION

The use of the mail fraud statute is ever expanding. This case presents extremely important legal issues concerning the permissible extent of federal criminal prosections to enforce nebulous conceptions of business ethics. Such expansion endangers the ability of the business community to conduct its affairs without unneeded intervention from the federal level. The Court of Appeals' decisions give the government free rein to impose their morality on the business community. The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals for the Fourth Circuit

PUBLISHED

No. 82-5341

United States of America,

Appellee

v.

Joseph Venneri

Appellant

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge. (Criminal Action No. 82-00188)

Argued: May 11, 1984 Decided: June 21, 1984

Before HALL and MURNAGHAN, Circuit Judges, and YOUNG, District Judge.

Geoffrey P. Gitner (William F. Krebs, Scherr, Krebs & Gitner on brief) for Appellant; Michael Schatzow, Assistant United States Attorney (J. Frederick Motz, United States Attorney on brief) for Appellee.

Honorable Joseph H. Young, United States District Judge for the District of Maryland, sitting by designation.

YOUNG, District Judge.

Joseph Venneri was convinced on three counts of mail frid. 18 U.S.C. §1341. On appeal Venneri asserts that the trial judge erred by: (1) improperly instructing the jury as to the elements of a "scheme to defraud" an employer of the honest and faithful services of its employee, (2) improperly instructing the jury that competitors and potential competitors had a right to compete for business on the basis of merit, quality, and costs; and (3) excluding evidence of the employee's other corrupt practices offered to show that defendant lacked specific intent and that there could be no potential harm to the employer.

The government charged defendant with devising a scheme (1) to defraud Marriott Corporation of the honest, faithful and loyal performance of the duties and services of its employee, Frederick Taylor; (2) to defraud Marriott of money and things of value, to which it was entitled; and (3) to defraud potential competitors of the opportunity to compete for the business of performing as subcontractors in construction of a Marriott hotel on the basis of merit, quality, and cost. The government's proof centered on defendant's payment for a piano delivered to Taylor, and Taylor's orchestration of a meeting between defendant and one of his competitors for a Marriott hotel subcontracting job. Defendant's company was subsequently awarded the subcontracting job.

Defendant contends that the trail court's instructions erroneously failed to "focus the jury's attention on the need to find that the defendant contemplated some kind of pecuniary harm to the employer," *United States v. Lemire,* 720 F.2d 1327, 1341 (D.C. cir. 1983), while leaving the jury with

the impression that deprivation of an employee's honest services alone constructed mail fraud. Defendant specifically objects to instructions stating that Marriott's right to the honest and faithful performance of services and duties is "a thing of value," and that to act with intent to defraud means to act with intent to deceive for the purpose of causing "some financial or other loss to another."

Initially, we note that defendant failed to raise properly his objection to these instructions below. Our review is therefore, limited to clear error. *United States v. McGaskill,* 676 F.2d 995 (4th Cir.), *cert. denied,* ____ U.S.____, 103 S.Ct. 381, 74 L. Ed. 513 (1982).* In *United States v. Shamy,* we stated that "(a)ny breach of fiduciary

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* Defendant did request an instruction which stated in relevant part: "if you find from all the evidence that the defendant failed to disclose some material information to the Marriott Corporation, in the (n) you may not convict him unless you also find that this failure to disclose resulted in a loss to the Marriott Corporation." The instruction cited *United States v. McNeive,* 536 F.2d 1245 (8th Cir. 1976) as authority. Without stating his reasons, defendant objected to the trial court's failure to give the requested instruction.

We do not find that the requested instruction adequately raised the issue on appeal below. The requested instruction went to the defendant's, not to the employer's disclosure, and spoke in terms of loss, not the potential for economic harm to the employer. Moreover, although the *McNeive* decision notes that the record in that case did not reflect "any tangible or pecuniary injury" suffered by the employer, it repeatedly speaks in terms of "material misrepresentation." 536 F.2d at 1251-52. In this case, the trial court's instructions referred to material nondisclosure as well as the need to find that the defendant contemplated injury to Marriott. Under such circumstances, the defendant failed to specify sufficiently his objections to the charge. Fed. R. Crim. Proc. 30.

duty by a corporate employee effected in part by the use of the mails may be violation of the federal mail fraud statute, at least when accompanied by concealment or a failure to disclose relevant material information." 656 F.2d 951, 957 (4th cir. 1981) (citation omitted), *cert. denied,* 455 U.S. 939 (1982). In this case, the trial judge instructed the jury that Taylor had a duty to disclose and not to conceal facts which were "material to the decisions of the Marriott Corporation in approving subcontractors," and that if the jury found beyound a reasonable doubt the Venneri and Taylor devised a scheme in which Taylor would breach this duty, then it could find "the defendant engaged in that scheme to defraud the Marriott Corporate." Since these instructions, as well as the other instructions taken as a whole, follow our statements regarding breach of fiduciary duty under the mail fraud statute, we find no reversible error.

Defendant also argues that the extension of the mail fraud statute to competitors is unprecedented and unjustified. However, we find ample authority in the cases cited by the government, for the application of the statute to the scheme to defraud competitors as alleged in this case. *See United States v. Castor,* 558 F.2d 379 (5th Cir. 1977), *cert. denied,* 434 U.S. 1010 (1978); *Gregory v. United States,* 253 F. 2d 104 (5th Cir. 1958). We find no error in the jury instructions concerning this issue.

Finally, defendant asserts that the trial judge erred in refusing to admit evidence of Taylor's other alleged corrupt practices to show that Venneri lacked the reuisite intent and to show that there was no potential harm to Marriott. However, we find the evidence irrelevant for the purposes advanced by defendant. Since defendant did not know of Taylor's other corrupt practices at the time of the transaction in this case, it can hardly serve to negate his intent. Moreover, we do not accept defendant's theory that such evidence is

relevant to show the Marriott could suffer no potential harm. Under defendant's theory, an employer could be defrauded of its employee's honest and faithful services only once; after the first bride the employer would have nothing left of which it could be deprived. Simply stated, that is not the law.

Accordingly, the judgment is

AFFIRMED

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(2)

84-266

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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9pp

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—Continued:

Statute and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-266

JOSEPH VENNERI, PETITIONER

v.

UNITED STATES OF AMERICA

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in instructing the jury that use of the mails to deprive an employer of the faithful services of its employee and to deprive competitors of a fair opportunity to compete violates the mail-fraud statute.

1. Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341, and sentenced to two years' imprisonment, 18 months of which was suspended in favor of two years' probation. Petitioner was also fined $1000 and ordered to make restitution of $3512. The court of appeals affirmed (Pet. App. A1-A5).

The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner and two co-conspirators bribed Frederick M. Taylor with a $7,000 grand piano in order to obtain favorable treatment with respect to the glass and glazing work on a Marriott hotel.[1] Taylor was Marriott's project manager for construction of the hotel. He arranged for petitioner and his associates to meet with the general contractor and Mid-South, the subcontractor who had submitted the lowest preliminary bid on the glass work, introducing the conspirators as consultants rather than as competing subcontractors. Petitioner was therefore able at this meeting to learn Mid-South's bid on the work. Subsequently, after the time for submitting final bids had closed, petitioner submitted a bid through Taylor that was $40,000 less than Mid-South's. Taylor convinced the general contractor to accept petitioner's bid. Because the bid was out of time, the savings were not reflected in the general contractor's bid and therefore were realized by the general contractor rather than by Marriott. Pet. App. A2; C.A. App. 45, 73-78, 98-101, 110-113, 130-139, 141.

2. Petitioner contends that the district court's instructions erroneously allowed the jury to convict on the basis of his bribe of Taylor without proof of economic loss or business risk to Marriott (Pet. 5-8) and on the basis of fraud with respect to Mid-South, the competing subcontractor (Pet. 8-10). These contentions, as well as his claim that the decision of the court of appeals conflicts with decisions from other circuits, are without merit.

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[1]Petitioner's co-conspirator Aaron Strauss testified at trial pursuant to a no-prosecution agreement. Co-conspirator Denny Stam, who was tried with petitioner, pleaded guilty to one count of mail fraud midway through the trial. Three invoices for the piano constituted the mailings charged in the indictment.

a. The courts of appeals have uniformly held that the mail-fraud statute extends to breaches of duty like that involved here, and this Court has consistently declined to review those decisions.[2] The offense may be established by proof that the defendant defrauded his victims of their employees' honest, faithful and loyal services, which occurs at least where the employee has misrepresented or failed to disclose material information when he was under a duty to do so.

Petitioner seizes on one portion of the instructions, which charged the jury (C.A. App. 293) that Marriott had a right to Taylor's faithful and loyal performance of his duties and that deprivation of that right may constitute a scheme to defraud within the meaning of 18 U.S.C. 1341. This, he contends (Pet. 7), allowed the jury to convict simply on the government's proof that Taylor violated a duty to disclose his receipt of the piano to Marriott, without proof of its materiality. But the jury was also instructed that Taylor had a duty to disclose to his employer "facts known to him

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[2]See, *e.g.*, *United States* v. *Feldman*, 711 F.2d 758, 763 (7th Cir.), cert. denied, No. 83-509 (Oct. 31, 1983); *United States* v. *Bronston*, 658 F.2d 920, 926 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States* v. *Shamy*, 656 F.2d 951, 957 (4th Cir. 1981), cert. denied, 455 U.S. 939 (1982); *United States* v. *Barta*, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *Mandel*, 591 F.2d 1347, 1361-1364, vacated on other grounds, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *Castor*, 558 F.2d 379, 383 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978); *United States* v. *Bush*, 522 F.2d 641, 646-648 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *United States* v. *Keane*, 522 F.2d 534, 544-546 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); *United States* v. *Bryza*, 522 F.2d 414 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *States*, 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974); *United States* v. *George*, 477 F.2d 508 (7th Cir.), cert. denied, 414 U.S. 827 (1973).

which he had reason to believe were *material to the decisions of the Marriott Corporation*"; that "the government must prove beyond a reasonable doubt that *some actual harm or injury to the Marriott Corporation was contemplated* " by petitioner; that petitioner must have intended to "cause[] some financial or other loss to another or [to] bring[] about some financial or other gain to [himself] or others"; and that "proof of *actual injury* to the victim" was required (C.A. App. 294-298; emphasis added). Taken as a whole, the instructions made it clear that petitioner could be convicted only upon a showing that Taylor's failure to disclose the bribe to Marriott was material to the corporation's business decisions or on a showing that Marriott suffered some other sort of direct harm.

These instructions surely did not constitute plain error, as they must for petitioner to prevail in light of his failure to object at trial (Pet. App. A3). There is no conflict with the decisions cited by petitioner (Pet. 7), which require only that any nondisclosure be material, something also required here. See *United States* v. *Lemire,* 720 F.2d 1327, 1336-1337 (D.C. Cir. 1983); *United States* v. *Feldman,* 711 F.2d 758, 763 (7th Cir.), cert. denied, No. 83-509 (Oct. 31, 1983); *United States* v. *Bethea,* 672 F.2d 407, 414 (5th Cir. 1982); *United States* v. *Ballard,* 663 F.2d 534, 540-541 (1981), modified on denial of reh'g, 680 F.2d 352, 353 (5th Cir. 1982). Indeed, the instructions given here were almost identical to those given in *Lemire,* which were extensively analyzed by that court and found not to require reversal (720 F.2d at 1339-1341). Even if the instructions might be questioned, there was surely no prejudice to petitioner in light of the clear proof that Marriott did suffer actual loss and that nondisclosure of the bribe was material.[3] Under these

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[3]Petitioner's scheme caused Marriott to lose an opportunity to realize the $40,000 in savings resulting from petitioner's lower bid because, with Taylor's help, the bid was submitted after the time during which

circumstances, review is unwarranted. See generally *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977); Fed. R. Crim. P. 30, 52(b).

b. Petitioner also contends (Pet. 8-10) that he could not be convicted of defrauding potential competitors of a fair opportunity to compete because he had no duty toward them. But by misrepresenting himself as a consultant rather than a competitor and thereby learning of Mid-South's bid, and by gaining an opportunity to submit a lower bid after the deadline had passed, petitioner deprived his competitor of the right to have its bid judged fairly on the merits. Such conduct has consistently been held to be within the mail-fraud statute. See, *e.g.*, *United States* v. *Castor*, 558 F.2d 379, 383-384 (7th Cir. 1977) (scheme aimed at reducing competitors' opportunity to compete), cert. denied, 434 U.S. 1010 (1978); *Gregory* v. *United States*, 253 F.2d 104 (5th Cir. 1958) (same); see also, *e.g.*, *Durland* v. *United States*, 161 U.S. 306 (1896) (predecessor statute not limited

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the savings would have accrued to Marriott. Moreover, it strains credulity to suggest that the bribe was not material: surely Marriott would have wanted to know that its project manager, who had responsibility for overseeing the work done on the hotel, had taken a substantial bribe from one of the subcontractors (see C.A. App. 80-82). The court's observations in *United States* v. *Bronston*, 658 F.2d at 929, are equally applicable here:

> Although a hypothetical can be posed in which one could be prosecuted for mail fraud on the basis of a breach of fiduciary duty accompanied by little more than a failure to disclose the breach to the person to whom the duty was owed, without any prospect of substantial economic harm to the victim, this is not such a case. Here we are faced with a straight-forward economic fraud * * *.

See also *United States* v. *George*, 477 F.2d at 512 (purchasing agent harmed employer by giving preferential treatment to one supplier over others).

to common-law fraud); *United States* v. *Mandel,* 591 F.2d 1347, 1361, aff'd in relevant part, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980) (mail-fraud statute applies to any "scheme involving deception that employs the mails in its execution that is contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing").

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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